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ABSTRACT

Litigation over the rights of handicapped students and employees continued at a significant level during 1989. Recovery of attorneys' fees was the most frequently litigated handicapped issue. Cases are summarized under the following topics: (1) entitlement to services; (2) procedural safeguards, including change in placement, administrative remedies, standing to sue, and statute of limitations; (3) placement, including appropriate educational program, least restrictive environment, and private facilities; (4) related services; (5) discipline; (6) remedies; (7) state immunity; (8) other Education of the Handicapped Act (EHA) issues; (9) state laws; and (10) discrimination under the Rehabilitation Act, Section 504. (MLF)

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HANDICAPPED

Allan G. Osborne, Jr.

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INTRODUCTION

As in previous years, litigation over the rights of handicapped students and employees continued at a significant level. Since 1986 when Congress passed the Handicapped Children's Protection Act, providing for the recovery of attorneys fees and other legal costs by parents who prevailed in special education actions, that issue has been the subject of much of the litigation. Again in 1989 recovery of attorneys fees was the most frequently litigated handicapped issue.

The United States Supreme Court heard one handicapped education case in 1989. In *Dellmuth v. Muth*[1] the court settled a controversy that developed among the appeals circuits by declaring that Congress did not abrogate the states' eleventh amendment immunity when it passed the Education for All Handicapped Children Act (EHA).

ENTITLEMENT TO SERVICES

Although the EHA requires school districts to provide handicapped children with a free appropriate public education which consists of any needed special education and related services,[2] the Act does not establish any specific substantive standards by which a given program can be judged to be adequate. The Act states that the handicapped child is entitled to specially designed instruction[3] that conforms to the student's individualized education program (IEP).[4] The Supreme Court has held that the handicapped child is entitled to personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction provided.[5] Although the courts have been cautioned not to impose their views of preferable educational methods[6] on school districts, they are continuously asked to determine what level of service is required to meet the Act's minimum standards.

The Eleventh Circuit Court of Appeals vacated and remanded a Florida federal district court decision that had ordered a restricted placement within a special education classroom for a student with

1. 109 S. Ct. 2397 (1989).
2. 20 U.S.C. § 1401(18).
3. 20 U.S.C. § 1401(16).
4. 20 U.S.C. § 1401(18)(d).
5. Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176 (1982).
6. *Id.*

Acquired Immune Deficiency Syndrome (AIDS). The district court initially had denied a preliminary injunction to prevent the child's exclusion but later held that the proper placement for the child, who drooled and was incontinent, was a separate room to be constructed within the classroom. A full time aide was also ordered to attend to the child. In remanding the appeals court instructed the lower court to consider the intricate relationship between the EHA and section 504 of the Rehabilitation Act. On remand the district court determined that the appropriate placement for the student if she did not have AIDS would be the special classroom. Since recent medical evidence indicated that the risk of transmission of the disease from bodily secretions was statistically remote, the court ordered the school district to admit the student to the classroom.[7]

The First Circuit Court of Appeals held that a handicapped child does not have to be capable of benefitting from special education in order to be eligible for services under the EHA. The child in question was a severely multihandicapped student who had sought an appropriate educational placement when he reached school age. The school district refused to provide services claiming that he was so severely disabled that he could not benefit from them. Following lengthy due process proceedings the district court held that the school district was not obligated to provide the student with special education. The appeals court reversed stating that the language of the EHA was unequivocal that "all handicapped children" were to be served. The court found no exception for the severely handicapped and found no requirement that the child must demonstrate an ability to benefit from the educational program in order to be eligible for services. Furthermore, the court found that the term "education" as used in the EHA is to be broadly defined; encompassing a wide spectrum of training which could include basic life skills.[8]

A Pennsylvania federal district court held that handicapped students are entitled to educational facilities comparable to those provided to nonhandicapped students. The court also found that the failure to open classes for the handicapped was a violation of their rights to a free appropriate public education. The parties had stipulated that due to the failure of member school districts to provide an intermediate education unit with adequate space, handicapped stu-

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7. Martinez v. School Bd. of Hillsborough County, Fla., 861 F.2d 1502 (11th Cir. 1988); *on rem'd* 711 F. Supp. 1066 (M.D. Fla. 1989). *See* Yearbook of Education Law 1989 at 96-7.

8. Timothy W. v. Rochester, N.H. School Dist, 875 F.2d 954 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 519 (1989).

dents had been placed in substantially unequal facilities which were excessively segregated, programs for the handicapped often had been relocated to make way for classes for the nonhandicapped, and new classes were not allowed to operate due to a lack of space.[9]

A federal district court in Virginia held that a handicapped student is not necessarily entitled to placement in the student's home school or the school the student would prefer to attend. The case involved a hearing impaired student who was placed in a centralized program within the district. The court held that in view of the limited resources available to a school district, establishment of a centralized program for students with low incidence type handicaps would better serve the interests of all students.[10]

PROCEDURAL SAFEGUARDS

One of the unique features of the EHA is that it contains a set of elaborate due process safeguards to ensure that handicapped children are properly identified, evaluated, and placed.[11] Under these provisions the parents of a handicapped child must be provided with the opportunity to participate in the development of an individualized education program for their child.[12] The EHA also requires school districts to obtain parental consent prior to evaluating the child or making an initial placement.[13] Once a handicapped child has been placed, the school district must provide the parents with proper notice before it may initiate a change in placement.[14]

If parents disagree with any of the decisions made by the school district they may request an impartial due process hearing.[15] Any party that is not satisfied with the final outcome of these administrative proceedings may appeal to the state or federal courts.[16] While an administrative or judicial proceeding is pending the school district may not change the child's placement without parental consent.[17]

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9. Hendricks v. Gilhool, 709 F. Supp. 1362 (E.D. Pa. 1989).
10. Barnett v. Fairfax County School Bd., 721 F. Supp. 757 (E.D. Va. 1989).
11. 20 U.S.C. § 1415.
12. 34 C.F.R. § 300.345.
13. 34 C.F.R. § 300.504(b).
14. 20 U.S.C. § 1415(b)(1)(C).
15. 20 U.S.C. § 1415(b)(2).
16. 20 U.S.C. § 1415(e)(2).
17. 20 U.S.C. § 1415(e)(3).

Change in Placement

The Court of Appeals for the District of Columbia Circuit heard three cases in 1989 dealing with EHA change in placement procedures. In the first case the court held that the private school a handicapped student had been attending for the past year was not the *status quo* since a hearing officer had ordered funding for that program for one year only. The student had been unilaterally placed in the private school by his parents while due process action was pending. The school district's IEP calling for a public school placement was determined to be appropriate but the hearing officer ordered the school district to fund the private school for one year due to procedural violations on the part of the school district. At the end of that year the school district again proposed a public school placement and the parents objected. The hearing officer's earlier decision that the proposed public school program was appropriate was reaffirmed. The appeals court held that the hearing officer's initial opinion clearly indicated that the private school placement was to be for one year only and that once the year ended that program ceased to be the current educational placement.[18]

In the second case the appeals court indicated that a handicapped child may remain in the then current placement only until the trial court proceedings are completed. The court held that the proceedings referred to in the EHA's *status quo* provision are administrative hearings and trial court actions. The court held that the *status quo* provision did not entitle the students in question to remain in a private school at public expense pending the review by the appeals court of a district court decision that upheld proposed public school placements.[19]

In the third case officials at the private school the student had been attending at public expense determined that the school could no longer provide him with an appropriate education. The school district proposed a public school placement but the parents rejected that offer and unilaterally enrolled the student in another private school. Although the hearing officer held that the proposed public school program was appropriate the district court held that the parents' chosen private school was the then current placement, reasoning that where the former program was private the interim program must also be private. The appeals court rejected that reasoning

18. Leonard v. McKenzie, 869 F.2d 1558 (D.C. Cir. 1989).
19. Andersen v. District of Columbia, 877 F.2d 1018 (D.C. Cir. 1989).

stating that a public school program is not inherently dissimilar to a private school program.[20]

In a case in which several of New York's state placement and review procedures were challenged, a federal district court held that the state's practice of terminating placements during the review process was a violation of the EHA.[21]

Administrative Remedies

Under the EHA's due process scheme the parties must exhaust all administrative remedies prior to filing court action unless it would be clearly futile to do so. In 1989 several federal courts refused to hear complaints because administrative remedies had not been exhausted.

The Sixth Circuit Court of Appeals dissolved a preliminary injunction issued by the district court to restrain enforcement of an athletic association's rule that barred a handicapped transfer student from participating in interscholastic sports for one year. The student had transferred because of his disability. The appeals court held that the state's established hearing procedures were adequate to provide the student with the relief sought. The court further held that the need for swift action may sometimes justify an exception to the exhaustion doctrine but not when the emergency was created by the parents' failure to request a hearing in a timely fashion.[22]

The Tenth Circuit Court of Appeals held that disciplinary actions, including short-term suspensions and time-out periods, are matters relating to the education of the child subject to the EHA's provisions. Therefore, parents must exhaust administrative remedies under the Act even if additional causes of action are brought under the Constitution or other statutes according to the court.[23]

The District of Columbia Court of Appeals held that although parents might be frustrated with the EHA's process they must still pursue all administrative remedies prior to seeking judicial review unless doing so would be futile or inadequate.[24] The First Circuit Court of Appeals also held that the EHA's comprehensive scheme requires the exhaustion of administrative remedies before recourse to the courts is permitted.[25] Neither court found justification for exemp-

20. Knight v. District of Columbia, 877 F.2d 1025 (D.C. Cir. 1989).
21. Louis M. v. Ambach, 714 F. Supp. 1276 (N.D.N.Y. 1989).
22. Crocker v. Tennessee Secondary School Athletic Ass'n, 873 F.2d 933 (6th Cir. 1989).
23. Hayes v. Unified School Dist. No. 377, 877 F.2d 809 (10th Cir. 1989).
24. Cox v. Jenkins, 878 F.2d 414 (D.C. Cir. 1989).
25. Christopher W. v. Portsmouth School Comm., 877 F.2d 1089 (1st Cir. 1989).

tion from that doctrine. The Sixth Circuit Court of Appeals reversed a district court tuition reimbursement award for failure to exhaust after it determined that the district court should have remanded to the hearing officer.[26]

Several of New York's administrative procedures were challenged in a class action suit. A federal district court held that the Commissioner of Education, as a state employee, was clearly not impartial as required by the EHA's due process provision. The court also found that the state's practice of remanding placement decisions for further proceedings contravened the EHA's intent to place handicapped children as quickly as possible and that evidence existed that there was a lack of parental involvement in the review process.[27]

The Supreme Court of New Hampshire upheld the state's review process for resolving inter-agency disputes. Under state law the Department of Education and the Department of Health and Human Services were jointly responsible for providing services to developmentally disabled individuals. The responsibilities of the two agencies overlapped and unfortunately handicapped students were sometimes denied services when each agency denied responsibility. Under legislative directive the Commissioners of both agencies developed a review procedure to resolve such disputes. The court held that this procedure did not violate the EHA since an aggrieved party was not required to follow it prior to appealing EHA administrative decisions to the courts.[28]

In a case where two students who attended a boarding school operated by the Bureau of Indian Affairs (BIA) sought attorneys fees under the Equal Access to Justice Act,[29] the Ninth Circuit Court of Appeals held that the EHA's due process mechanism did not apply to BIA schools. In a footnote the court stated that it did not need to consider the EHA claims of one of the students, who was handicapped, since the Secretary of the Interior, pursuant to the EHA, had established substantially equivalent review procedures that apply to BIA schools.[30]

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26. Doe v. Smith, 879 F.2d 1340 (6th Cir. 1989).
27. Louis M. v. Ambach, 714 F. Supp. 1276 (N.D.N.Y. 1989).
28. Guy J. v. Commissioner, N.H. Dep't of Educ., 565 A.2d 397 (N.H. 1989).
29. 28 U.S.C. § 2412.
30. Ramon v. Soto, 889 F.2d 891 (9th Cir. 1989), *withdrawn, reh'g granted.*

Standing to Sue

The Eleventh Circuit Court of Appeals held that a local education agency (LEA) is not allowed to bring a lawsuit seeking to compel a state to fulfill its statutory duties under the EHA. Several LEAs had filed suit claiming that the state of Georgia had failed to uphold its duties and that without state assistance they could not provide appropriate placements for severely handicapped students. The district court dismissed the suit and the appeals court affirmed. The appeals court added, however, that in an appropriate case challenging a student's IEP the LEA could defend itself by asserting that the state is primarily responsible for the EHA's implementation.[31]

The Fourth Circuit Court of Appeals held that a mentally retarded student had standing to sue to recover reimbursement for the partial depletion of health insurance benefits that had been used to pay for her education at a private residential facility. Under the terms of her health insurance policy she had a maximum lifetime benefit of $100,000 for the treatment of mental and nervous disorders. While she attended the residential facility the insurance company paid over $64,000 toward her tuition and other expenses. When she filed suit against the school district for reimbursement the district court held that she lacked standing to sue since it was her parents who suffered the injury. The appeals court reversed holding that she had standing to sue since the use of insurance benefits diminished her resources.[32]

Statute of Limitations

The EHA does not contain a statute of limitations for filing a lawsuit. Courts must, therefore, turn to applicable state statutes to determine whether a given lawsuit is timely. The District of Columbia Court of Appeals held that a suit under the EHA is similar to an administrative decision and thus, a local thirty day limitation on appeals of such decisions was applicable. However, since the school district had not notified the parents of this thirty day limitation the court held that the present suit was not time barred.[33] The Fourth Circuit Court of Appeals held that the state's three year statute of

31. Andrews v. Ledbetter, 880 F.2d 1287 (11th Cir. 1989).
32. Shook v. Gaston County Bd. of Educ., 882 F.2d 119 (4th Cir. 1989).
33. Spiegler v. District of Columbia, 866 F.2d 461 (D.C. Cir. 1989).

limitations did not begin until the student reached the age of majority due to her infancy and incompetency.[34]

Actions Under Other Statutes

When Congress amended the EHA in 1986 with the Handicapped Children's Protection Act (HCPA)[35] it removed the restrictions and limitations the United States Supreme Court had placed on filing lawsuits under the Constitution and other federal statutes.[36] A lawsuit was filed in the federal district court in Connecticut against the state Board of Education claiming that the Board failed to make *bona fide* attempts to resolve complaints against a local school district and the Department of Children and Youth Services. The suit further claimed that the state failed to fully implement complaint resolution procedures as required by federal regulations in violation of the EHA, other federal statutes, and the fourteenth amendment. The district court dismissed all claims but the appeals court reversed and remanded.[37] On remand the district court held that a private right of action under section 1983 can be maintained for a claimed violation of the EHA.[38] However, a federal district court in Virginia held that a damage claim under section 1983[39] must be predicated on more than a reallegation of violations of the EHA.[40]

PLACEMENT

School districts are required to "insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services."[41] That continuum must range from placement within the regular classroom to a private residential facility and must also include homebound instruction. However, the placement chosen for any given handicapped student must be in the least restrictive environment appropriate for that child.[42] The placement must be made at public expense and

34. Shook v. Gaston County Bd. of Educ., 882 F.2d 119 (4th Cir. 1989).
35. 20 U.S.C. § 1415(e)(4)(B) *et seq.*
36. Smith v. Robinson, 468 U.S. 992 (1984).
37. Mrs. W. v. Tirozzi, 832 F.2d 748 (2d Cir. 1987). *See* Yearbook of Education Law 1988 at 113 and 131.
38. Mrs. W. v. Tirozzi, 706 F. Supp. 164 (D. Conn. 1989).
39. 42 U.S.C. § 1983.
40. Barnett v. Fairfax County School Bd., 721 F. Supp. 755 (E.D. Va. 1989).
41. 34 C.F.R. § 300.551(a).
42. 34 C.F.R. § 300.550.

must meet state educational standards.[43] Every placement must be reviewed at least annually.[44] The Supreme Court has held that an appropriate placement is one that is developed in compliance with the EHA's procedures and is reasonably calculated to enable the child to receive educational benefits.[45]

Appropriate Educational Program

A federal district court in California held that a student benefitted educationally from a public school program since a preponderance of the evidence indicated that he progressed in all areas. The student had been unilaterally removed from the public school program and enrolled in a private school by his parents. During the litigation his parents argued that he achieved better results at the private school. The court, however, held that his progress at the private school did not affect the appropriateness of the public school's offering since an appropriate program does not mean the best or one that has the most potential maximizing effect. The court stressed that the responsibility of picking between competing methodologies was left by the EHA to state and school officials.[46]

The Supreme Court of Virginia held that a public school program was appropriate since evidence indicated that the student had received benefit from that program in the past and would continue to do so. That evidence also indicated that the student's progress was comparable to that of other students in the program. The court further found that any lack of progress was due to factors unrelated to the program itself such as the student's tardiness, lack of motivation, and difficulty responding to parental authority.[47]

Least Restrictive Environment

The Fifth Circuit Court of Appeals established a two prong test for the lower courts to use in determining whether school districts have complied with the EHA's least restrictive environment provision. The case involved a six year old Down Syndrome child with an overall developmental level between two and three years. The school district had proposed a substantially separate special education

43. 20 U.S.C. § 1401(18).
44. 34 C.F.R. § 300.552(a)(1).
45. Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176 (1982).
46. Bertolucci v. San Carlos Elementary School Dist., 721 F. Supp. 1150 (N.D. Cal. 1989).
47. School Bd. of Campbell County v. Beasley, 380 S.E.2d 884 (Va. 1989).

placement with minimal mainstreaming. The parents preferred a program that included placement in a regular education classroom for at least half the school day. An independent hearing officer concluded that the regular education curriculum was beyond the student's abilities and that he would receive little educational benefit from regular class placement. Furthermore, the hearing officer found that meeting the child's needs would divert too much of the teacher's attention from the rest of the class. The district court and appeals court agreed.[48]

In upholding the school district's proposal the appeals court noted that

> [b]y creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the Act. School districts must both seek to mainstream handicapped children and, at the same time, must tailor each child's educational placement and program to his special needs.[49]

The court found that for some children mainstreaming was not appropriate because placement in a regular education environment would not provide them with a free appropriate public education. To assist the lower courts in balancing the competing interests the Fifth Circuit Court turned to the language of the EHA to develop its two part test. The appeals court held that a court must first determine whether education in the regular classroom, with supplementary aids and services, can be achieved satisfactorily. If it cannot, and special education must be provided, the court must determine whether the school has mainstreamed the child the maximum extent appropriate.

In a 1988 case the Supreme Court of Idaho reached a somewhat different conclusion. This case also involved a severely handicapped student who had an assessed I.Q. of 37. Initially he attended a segregated public school classroom but his parents later enrolled him in a parochial school where he was placed in a regular education classroom. The parents requested that the school district provide a full time one-to-one aide. The school district refused but agreed to provide some related services. The state supreme court held that mainstreaming was an important factor to be considered in assessing an appropriate education and that by accepting federal funds the school district was obligated to accept mainstreaming to the maximum extent appropriate. The court stated that by arguing that its segre-

48. Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989).
49. *Id.* at 1044.

gated classroom was appropriate the school district ignored the congressional intent that mainstreaming was preferred to a segregated setting, no matter how appropriate the segregated setting might be.[50]

The Second Circuit Court of Appeals also found that mainstreaming is not appropriate for some students. In ruling that the school district's proposed segregated placement for a hearing impaired student was appropriate, the court noted that there was no evidence to substantiate the parents' claim that the student's needs could be met in a mainstreamed environment.[51] In considering the proper balance between mainstreaming and an appropriate program the court noted that

> [w]hile mainstreaming is an important objective, we are mindful that the presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to handicapped students . . . . Under the Act, where the nature or severity of the handicap is such that education in regular classes cannot be achieved satisfactorily, mainstreaming is inappropriate.[52]

Using a similar rationale the Fourth Circuit Court of Appeals affirmed a district court ruling that an autistic student could not be satisfactorily educated in a regular classroom environment even with supplementary aids and services.[53]

A federal district court in Virginia found that the EHA's least restrictive environment mandate does not create an absolute duty, but rather, is only one of several components of an appropriate education. The court held that a school district was not required to place a hearing impaired student in that student's home school or the school the student would prefer to attend, but could place the student in a centralized program within the district.[54] However, a Pennsylvania federal district court held that the EHA's mainstreaming objective is thwarted when classes for the handicapped are unnecessarily segregated and isolated.[55] The Eleventh Circuit Court of Appeals in remanding a case concerning the proper placement for a handicapped student with AIDS instructed the lower court to re-

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50. Thornock v. Boise Indep. School Dist. No. 1, 767 P.2d 1241 (Idaho 1988).
51. Briggs v. Board of Educ. of Conn., 882 F.2d 688 (2d Cir. 1989).
52. *Id.* at 692.
53. Devries v. Fairfax County School Bd., 882 F.2d 876 (4th Cir. 1989).
54. Barnett v. Fairfax County School Bd., 721 F. Supp. 757 (E.D. Va. 1989). *See* n.10 and accompanying text.
55. Hendricks v. Gilhool, 709 F. Supp. 1362 (E.D. Pa. 1989). *See* n.9 and accompanying text.

member the least restrictive environment mandate in determining whether the student could be educated in a special education classroom rather than in an isolated cubicle constructed within the classroom.[56]

The administrative burden of educating a handicapped student in the regular classroom cannot overcome Congress' preference for mainstreaming according to a ruling by a federal district court in Ohio, unless there is evidence that the student would not benefit from mainstreaming, that the benefits of education in a segregated setting far outweigh the benefits of a mainstream setting, or that the child would be a disruptive influence in the mainstream. The court held that a proposed IEP was inappropriate since it failed to provide sufficient mainstreaming.[57]

Private Facilities

The Eleventh Circuit Court of Appeals affirmed a district court's order to provide an autistic and mentally retarded student with a residential placement. The court held that sufficient evidence existed to support the district court's finding that a proposed public school program did not provide the student with a basic floor of opportunity. The district court had found that the evidence indicated that the student would not progress without a residential placement.[58]

The District of Columbia Court of Appeals held that a public school program was appropriate even though the IEP was written in terms that related to a private school the student had been attending. The court noted that an IEP is not bound to one location and that the IEP in question could be fully implemented in the public school. Since the parents were unable to show that the proposed public school placement was inappropriate, the court upheld the district's proposal. The court also held that an erroneous placement letter indicating that private school funding would continue the following year did not preclude the public school placement since a corrective letter was sent out long before the start of the school year.[59]

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56. Martinez v. School Bd. of Hillsborough County, Fla., 861 F.2d 1502 (11th Cir. 1988). *See* n.7 and accompanying text.

57. Gillette v. Fairland Bd. of Educ., 725 F. Supp. 343 (S.D. Ohio 1989).

58. Drew P. v. Clarke County School Dist., 877 F.2d 927 (11th Cir 1989). *See* Yearbook of Education Law 1988 at 117.

59. Leonard v. McKenzie, 869 F.2d 1558 (D.C. Cir. 1989).

In a 1988 case a federal district court in New Jersey held that a residential placement was the least restrictive environment for a student with learning and emotional problems. In ordering the residential placement the court noted that state law required a placement in which the student could best achieve success in learning. In this case the court determined that the student's emotional problems could not be severed from the learning process so that a residential placement was required for learning to take place.[60] However, a state appeals court in Tennessee held that the placement of a student with learning and social difficulties in a private psychiatric facility was for medical and not educational purposes and therefore was not subject to public funding.[61]

RELATED SERVICES

The EHA mandates that handicapped students are to be provided with related or supportive services if such services are required to assist the students in benefitting from their special education.[62] The only limitation placed on what could be considered a related service is that medical services are exempted unless they are for diagnostic or evaluative purposes. The Supreme Court has held that related services need to be provided only to students receiving special education and only those services that are necessary for the child to benefit from special education must be provided.[63]

A federal district court in Michigan held that under the EHA a handicapped student is entitled to transportation and incidents thereto. The court affirmed a state level hearing officer's decision that a trained aide could be provided to assist a medically fragile student during transportation so that the student could receive special education services in a school setting rather than at home. The district court stated that the provision of an aide or even another health professional did not constitute an exempted medical service.[64]

The Sixth Circuit Court of Appeals affirmed a district court decision that the school district was not required to provide a handi-

60. B.G. v. Cranford Bd. of Educ., 702 F. Supp. 1140 (D.N.J. 1988).
61. Metropolitan Gov't of Nashville and Davidson County v. Tennessee Dep't of Educ., 771 S.W.2d 427 (Tenn. Ct. App. 1989).
62. 20 U.S.C. § 1401(17).
63. Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984).
64. Macomb County Intermediate School Dist. v. Joshua S., 715 F. Supp. 824 (E.D. Mich. 1989).

capped student with transportation to a private school funded by her parents since her handicap did not require any special transportation needs. The court held that when a student is voluntarily enrolled in a private school the public school district is not required to provide a related service if that service is not designed to meet the student's unique needs.[65] A Florida state appeals court held that there is no legal requirement that a school district provide transportation for a handicapped student to a geographically distant facility when there is no evidence that the school district was not providing an appropriate education in a closer facility that the student had been attending.[66]

A state appellate court in Tennessee held that payment for the services rendered by a psychiatrist are expressly excluded by the EHA since they are medical services. In this instance they were not being provided for diagnostic or evaluative purposes but were associated with a placement in a private psychiatric facility.[67]

DISCIPLINE

Although the EHA does not contain any mandates that specifically refer to discipline, disciplinary sanctions as applied to handicapped students have been the issue in numerous cases. However, several of the EHA's provisions, such as the change in placement procedures and *status quo* provision,[68] apply to the disciplinary process. The Supreme Court has emphatically stated that handicapped students cannot be expelled for disciplinary reasons, where the related behavior was a manifestation of the handicap.[69] They may, however, be temporarily suspended and are subject to other normal disciplinary sanctions.

The Supreme Court's 1988 decision appears to have settled much of the controversy surrounding the discipline of handicapped students as only one case has been reported since then. The Tenth Circuit Court of Appeals held that short-term disciplinary mea-

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65. McNair v. Oak Hills Local School Dist., 872 F.2d 153 (6th Cir. 1989). *See* Yearbook of Education Law 1988 at 120.

66. School Bd. of Pinellas County v. Smith, 537 So. 2d 168 (Fla. Dist. Ct. App. 1989).

67. Metropolitan Gov't of Nashville and Davidson County v. Tennessee Dep't of Educ., 771 S.W.2d 427 (Tenn. Ct. App. 1989).

68. *See* nn.14 & 17 and accompanying text.

69. Honig v. Doe, 484 U.S. 305 (1988). *See* Yearbook of Education Law 1989 at 110-11.

sures, such as in-school suspensions and temporary placement in a time-out room, did not amount to a change in placement. However, the court held that these sanctions constituted a matter relating to the education of the child and thus fell within the scope of the EHA. The case was reversed and remanded because the parents had not exhausted administrative remedies prior to filing suit.[70]

REMEDIES

If a school district fails to provide a handicapped student with an appropriate placement the courts are empowered to "grant such relief as the court determines is appropriate."[71] Often the relief granted involves reimbursement of costs borne by the parents in unilaterally obtaining appropriate services for their child. According to the Supreme Court school districts are required to reimburse parents for any unilaterally obtained private schooling if they prevail in having their chosen placement determined to be appropriate.[72] Awards of compensatory educational services have been made in situations where the parents did not have the means to obtain the necessary services while litigation was pending.

Congress amended the EHA in 1986 with the Handicapped Children's Protection Act (HCPA)[73] which allows parents who prevail in an EHA suit against the school district to recover their legal expenses. Since then the reimbursement of attorneys fees has been the most frequently litigated issue under the EHA.[74]

Damages

A federal district court in Virginia denied an award of monetary damages for mental and emotional distress allegedly suffered by a hearing impaired student because he was required to attend a school other than his home school in order to receive a free appropriate public education. The court stated that it has clearly been established that, except for tuition reimbursement, compensatory damages are not recoverable under the EHA. The court further indicated that a

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70. Hayes v. Unified School Dist. No. 377, 877 F.2d 809 (10th Cir. 1989). *See* n.23 and accompanying text.

71. 20 U.S.C. § 1415(e)(2)(C) *et seq.*

72. Burlington School Comm. v. Department of Educ., 471 U.S. 359 (1985).

73. 20 U.S.C. § 1415(e)(4)(B) *et seq.*

74. *See* Yearbook of Education Law 1988 at 108-109 and Yearbook of Education Law 1989 at 95-96.

damage claim under another federal statute would have to be predicated on more than a reallegation of EHA violations.[75]

Tuition Reimbursement

The Eleventh Circuit Court of Appeals affirmed a lower court decision that the parents of an autistic student were entitled to be reimbursed for some of the costs of a unilaterally obtained residential school placement since sufficient evidence existed to support the finding that the school district's proposed program did not provide the student with a basic floor of educational opportunity.[76] Two courts awarded tuition reimbursement after it had been shown that the school district failed to provide a free appropriate public education in the least restrictive environment. One of those courts indicated that the parents' failure to consult with school officials regarding their choice of an alternative placement did not deprive them of their right to reimbursement since the IEP was presented only ten days prior to the start of the school year and the school district had indicated that it would not consider further mainstreaming.[77] The other court awarded reimbursement of tuition at a parochial school stating that the school district's failure to offer an appropriate education, which included substantial mainstreaming, gave the student's parents justification for the parochial school placement.[78]

Tuition reimbursement was awarded by the New Jersey Supreme Court after it found that the school district's proposed IEP was inappropriate since it was drafted in such a fashion that the student's progress could not be measured. The court denied reimbursement for room and board, however, because it found that placement in a boarding school was not necessary.[79] The Sixth Circuit Court of Appeals held that the parents of a handicapped child did not waive their right to seek tuition reimbursement by placing their child in a private school without school district approval.[80]

The Second Circuit Court of Appeals held that parents cannot be reimbursed for unilateral placements that are made in facilities that are not approved by the state since such placements cannot be considered to be proper under the EHA because they do not meet state

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75. Barnett v. Fairfax County School Bd., 721 F. Supp. 755 (E.D. Va. 1989). *See* n.40 and accompanying text.

76. Drew P. v. Clarke County School Dist., 877 F.2d 927 (11th Cir. 1989).

77. Gillette v. Fairland Bd. of Educ., 725 F. Supp. 343 (S.D. Ohio 1989).

78. Thornock v. Boise Indep. School Dist. No. 1, 767 P.2d 1241 (Idaho 1988).

79. Lascari v. Board of Educ. of Ramapo Indian Hills Regional High School Dist., 560 A.2d 1180 (N.J. 1989).

80. Doe v. Smith, 879 F.2d 1340 (6th Cir. 1989).

standards as required by the Act.[81] A New Jersey federal district court also denied tuition reimbursement for an out-of-state behavioral program that was not on the state's list of approved educational facilities. The court further found that the behavioral program could not be considered a related service since it was isolated from and incongruent with any educational experience.[82] However, the Supreme Judicial Court of Massachusetts held that reimbursement was required if the parents chosen facility was appropriate even if it was not on the state's approved list. The Massachusetts court held that if the parents and the school district agreed to a non-approved placement there was nothing to prevent them from seeking state approval for that placement.[83]

Under the Supreme Court's *Burlington* ruling tuition reimbursement is not appropriate if the school district offered and had the capacity to provide a free appropriate public education. The District of Columbia Court of Appeals denied reimbursement in two cases where it had been shown that the school district's proposed placement was appropriate.[84]

Attorneys Fees

Most of the attorneys fees litigation in 1989 involved the question of whether reimbursement of legal expenses was authorized by the HCPA when the dispute between the parents and school district was settled at the administrative hearing level. The courts are split on this issue with the majority holding that attorneys fees reimbursement is available for legal work completed at the administrative level.

The Eleventh Circuit Court of Appeals held that the term "any action or proceeding" in the HCPA includes administrative hearings and appeals.[85] The federal district court in Massachusetts also found that the plain language of the statute indicated that Congress intended for those who were successful at the administrative level to recover their legal costs.[86] The Fifth Circuit Court of Appeals found that the legislative history of the HCPA reflected Congress' unequivocal intent to award attorneys fees to parents for representation

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81. Tucker v. Bay Shore Union Free School Dist., 873 F.2d 563 (2d Cir. 1989).
82. B.G. v. Cranford Bd. of Educ., 702 F. Supp. 1158 (D.N.J. 1988).
83. Carrington v. Commissioner of Educ., 535 N.E.2d 212 (Mass. 1989).
84. Andersen v. District of Columbia, 877 F.2d 1018 (D.C. Cir. 1989); Knight v. District of Columbia, 877 F.2d 1025 (D.C. Cir. 1989).
85. Mitten v. Muscogee County School Dist., 877 F.2d 932 (11th Cir. 1989). *Cf.* Drew P. v. Clarke County School Dist., 877 F.2d 927 (11th Cir. 1989).
86. Williams v. Boston School Comm., 709 F. Supp. 27 (D. Mass. 1989).

at administrative hearings.[87] That same court also held that services rendered in anticipation of a hearing fall within the HCPA's authorization to award attorneys fees for services connected with an administrative hearing even when the proceedings do not reach the hearing stage.[88] The Ninth Circuit Court of Appeals joined the majority of other circuits in holding that prevailing parents may recover attorneys fees, costs, and other expenses incurred in administrative proceedings.[89]

However, the Court of Appeals for the District of Columbia held that the district court did not have the authority to award attorneys fees to prevailing parents at the administrative level who filed a lawsuit solely to recover those fees. The appeals court found that the language Congress used in the HCPA provided for an award of attorneys fees only in cases where the losing party in administrative hearings appealed to the courts and prevailed in judicial action. The court also found that the legislative history of the HCPA did not reflect a clearly stated intention to the contrary that would allow a court to depart from the statutory language.[90]

Other litigation has involved the question of what constitutes a prevailing party under the HCPA. The federal district court in Rhode Island held that the parents of a handicapped child were the prevailing party since they succeeded on a significant issue and obtained their objective.[91] The New Hampshire federal district court also held that the parents were the prevailing party since they succeeded on a significant issue.[92] The Eleventh Circuit Court of Appeals held that the parents were the prevailing party since they achieved the most significant relief sought — a free appropriate public education.[93]

One provision in the HCPA indicates that recovery of attorneys fees is not available to parents for legal work completed after an offer of settlement is made by the school district if the final relief obtained is not more favorable than the school district's previous offer.[94] A federal district court in Tennessee denied a motion for

87. Duane M. v. Orleans Parish School Bd., 861 F.2d 115 (5th Cir. 1988).
88. Shelly C. v. Venus Indep. School Dist., 878 F.2d 862 (5th Cir. 1989). *Cf.* Mr. D. v. Glocester School Comm., 711 F. Supp. 66 (D.R.I. 1989).
89. McSomebodies (No. 1) v. Burlingame Elementary School Dist., 886 F.2d 1558 (9th Cir. 1989); McSomebodies (No. 2) v. San Mateo City School Dist., 886 F.2d 1559 (9th Cir. 1989).
90. Moore v. District of Columbia, 886 F.2d 335 (D.C. Cir. 1989).
91. Mr. D. v. Glocester School Comm., 711 F. Supp. 66 (D.R.I. 1989).
92. James v. Nashua School Dist., 720 F. Supp. 1053 (D.N.H. 1989).
93. Mitten v. Muscogee County School Dist., 877 F.2d 932 (11th Cir. 1989).
94. 20 U.S.C. § 1415(e)(4)(D).

attorneys fees since the school district had made a settlement offer prior to a due process hearing that was substantially similar to the final relief obtained by the parents.[95]

The Eleventh Circuit Court of Appeals also held that the fact that the parents had not paid any attorneys fees was irrelevant to an award being made. The court stated that the right to attorneys fees did not depend on the parents' financial status or the availability of free legal assistance.[96]

STATE IMMUNITY

The eleventh amendment to the Constitution protects the states from lawsuits in the federal courts. However, Congress may abrogate the states' eleventh amendment immunity when it enacts legislation if it makes its intention to do so known in clear and unmistakable language within the statute itself.[97]

Controversy had arisen among the federal circuits as to whether Congress had specifically abrogated the states' eleventh amendment immunity when it passed the EHA.[98] In *Dellmuth v. Muth*[99] the Supreme Court held that Congress had not done so. In its ruling the Court relied on its *Atascadero* decision but added that the "clear and unmistakable language" must be both unequivocal and textual. The Court specifically rejected the approach used by the Third Circuit Court of Appeals of turning to the EHA's legislative history to determine Congress' intent.[100] The Court reasoned that if the language of the statute was unmistakably clear then recourse to the legislative history was not necessary and if the language was not unmistakably clear then the *Atascadero* rule had not been met. The Court found that the EHA did not mention either the eleventh amendment or sovereign immunity and thus did not demonstrate Congress' intent to abrogate eleventh amendment immunity with unmistakable clarity.

The Court also vacated and remanded an appeal from the Second Circuit for further consideration in light of its *Dellmuth* deci-

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95. Hyden v. Board of Educ. of Wilson County, 714 F. Supp. 290 (M.D. Tenn. 1989).
96. Mitten v. Muscogee County School Dist., 877 F.2d 932 (11th Cir. 1989).
97. Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).
98. *See* Yearbook of Education Law 1989 at 109.
99. 109 S. Ct. 2397 (1989).
100. Muth v. Central Bucks School Dist., 839 F.2d 113 (3d Cir. 1988).

sion.[101] On remand the appeals court reaffirmed its prior holding that a student was entitled to compensatory educational services at a state operated institute for the blind. The court held that its previous decision was not based on abrogation of eleventh amendment immunity but was reached after it had concluded that the awarding of compensatory services would not violate the eleventh amendment. After considering *Dellmuth*, the court continued to believe that awarding compensatory services did not violate the eleventh amendment since such an award is prospective in nature.[102]

OTHER EHA ISSUES

A federal district court in Pennsylvania held that the EHA specifically stated that a private insurance carrier was not relieved of its obligation to pay for services to a handicapped child. The insurance company had refused to pay for special education services for a student injured in an automobile accident claiming that the state and the local school district were required to provide the needed services. The court also held that the insurance company did not have standing to sue because only a student seeking special education services could invoke the EHA.[103]

The Fifth Circuit Court of Appeals affirmed a United States Education Department finding that EHA funds had been misapplied by the state education agency and an order that $700,000 be refunded. In Louisiana the state Board of Elementary and Secondary Education (BESE) and the Superintendent of Education exercise common jurisdiction over education in the state. They had jointly applied for funds under the EHA and the funds were disbursed by the Superintendent. However, the BESE objected to the Superintendent's spending of the funds and notified the Education Department of its concerns which led to an audit and the ultimate refund order. BESE objected to that order since it had not received the funds; however, the appeals court held that BESE was the recipient and the party responsible for overseeing the expenditure of the funds.[104]

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101. Burr v. Ambach, 109 S. Ct. 3209 (1989). *See* Yearbook of Education Law 1989 at 112.

102. Burr v. Sobol, 888 F.2d 258 (2d Cir. 1989).

103. Gehman v. Prudential Property and Casualty Ins. Co., 702 F. Supp. 1192 (E.D. Pa. 1989).

104. Louisiana State Bd. of Elementary and Secondary Educ. v. United States Dep't of Educ., 881 F.2d 204 (5th Cir. 1989).

STATE LAWS

A state court in New York held that a request for residential school tuition reimbursement for the summer months was timely under state law since it was filed before the close of the school year to which it pertained.[105] A New York City criminal court held that under state law a victim's special education records were confidential and thus privileged. Since the defendant had not made a showing that the records would be relevant or material the court held that he was not entitled to examine them.[106]

A Pennsylvania court held that the state statutes did not preclude the state education agency from considering fiscal constraints as a factor when it made a decision to disapprove an intermediate unit's plan and budget. The court found that the agency must consider the reality of fiscal allocations when enough money has not been allocated to allow intermediate units and school districts to implement every program they wished.[107]

Pursuant to Missouri law the parents of two handicapped students appealed a school district's proposed IEPs. While the appeals were pending the school district drafted new IEPs calling for services at a vocational school. The vocational school did not agree to the plans and the trial court added it as a party to the lawsuit. The appellate court held that the trial court lacked authority to add the vocational school to the proceedings since it had not been afforded notice and a hearing prior to the order.[108]

The Supreme Court of Rhode Island held that children who resided in a private nonprofit residential school for dependent and neglected children were entitled to access to speech therapy services in the public schools. The controversy centered on whether the residential school was a "closed facility" under state law. The court held that it was not since the children were not unable to leave the facility. Since it was not a closed facility the children were entitled to access services in the public schools even on a part-time basis.[109]

The West Virginia Supreme Court of Appeals supported a Human Rights Commission's finding of discrimination against the school district for failing to provide two hearing impaired students

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105. *In re* Savio, 537 N.Y.S.2d 262 (App. Div. 1989).
106. People v. Manzanillo, 546 N.Y.S.2d 954 (Crim. Ct. 1989).
107. Lincoln Intermediate Unit No. 12 v. Commonwealth, 553 A.2d 1020 (Pa. Commw. Ct. 1989).
108. State *ex rel.* Clinton Area Vocational School v. Dandurand, 766 S.W.2d 169 (Mo. Ct. App. 1989).
109. *In re* Children Residing at St. Aloysius Home, 556 A.2d 552 (R.I. 1989).

with an appropriate education in the least restrictive environment. The court also awarded compensatory services until age twenty-four for one student as well as incidental damages for emotional distress to both students.[110]

DISCRIMINATION UNDER THE REHABILITATION ACT, SECTION 504

Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[111] Section 504 effectively prohibits any recipient of federal funds from discriminating against handicapped persons in the provision of services or employment. Section 504 applies to any agency that receives federal funds, not just schools. For that reason this section includes cases that may not have arisen in an educational context but are still applicable to educational programs that receive federal funds.

Students

A federal district court held that the failure of the Pennsylvania Secretary of Education to ensure that educational facilities for the handicapped were comparable to those provided to nonhandicapped students violated section 504. The court also held that the failure of member school districts to provide adequate space to an intermediate educational unit, which resulted in the relocation of special education classes to make room for regular education classes, and a failure to open needed new classes for the handicapped, violated section 504.[112]

The Eleventh Circuit Court of Appeals noted that the relationship between the EHA and section 504 is very intricate in remanding a case concerning a handicapped student with AIDS. The appeals court instructed the lower court to first determine the most appropriate educational placement for the child and then determine

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110. Board of Educ. of County of Lewis v. West Virginia Human Rights Comm., 385 S.E.2d 637 (W. Va. 1989).

111. 29 U.S.C. § 794.

112. Hendricks v. Gilhool, 709 F. Supp. 1362 (E.D Pa. 1989). *See* nn.9 & 55 and accompanying text.

if the child otherwise qualified to be educated in that setting despite having AIDS. If not, the lower court was instructed to determine whether reasonable accommodations would reduce the risk of transmission of AIDS.[113] On remand the district court ordered the school district to admit the student to the special education class.[114]

The Eighth Circuit Court of Appeals upheld a district court decision that a multihandicapped carrier of hepatitis B was a handicapped person within the meaning of section 504 and had been denied admission to a residential rehabilitation facility because he was a carrier. However, the appeals court found that the lower court had erred in determining that the facility could reasonably accommodate him by inoculating those staff members who would come in contact with him. The appeals court stated that the lower court had underestimated the costs involved in implementing its order and the administrative burden of monitoring the process. The court also found that the limited inoculation plan approved by the district court would expose the staff to excessive risk. The lower court's decision was reversed and remanded.[115]

In a lawsuit involving the appropriate placement of a hearing impaired student under the EHA a Virginia federal district court held that section 504 does not create any tort liability for educational malpractice. Before any claim could be brought, according to the court, bad faith or intentional discrimination would have to be shown. The court found that compliance with the EHA established compliance with section 504 and that the student had not been discriminated against on the basis of his handicap since he had not been denied the opportunity to participate in any program.[116]

A federal district court in New York held that a school district must provide a sign language interpreter for certain school functions to the hearing impaired parents of nonhearing impaired students. The court found that the parents were otherwise qualified and were entitled to meaningful access to school initiated conferences incident to their children's education. Meaningful access requires more than accommodation of a privately obtained interpreter according to the court.[117]

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113. Martinez v. School Bd. of Hillsborough County, Fla., 861 F.2d 1502 (11th Cir. 1988).

114. Martinez v. School Bd. of Hillsborough County, Fla., 711 F. Supp. 1066 (M.D. Fla. 1989). *See* n.7 and accompanying text.

115. Kohl v. Woodhaven Learning Center, 865 F.2d 930 (8th Cir. 1989).

116. Barnett v. Fairfax County School Bd., 721 F. Supp. 755, 721 F. Supp. 757 (E.D. Va. 1989).

117. Rothschild v. Grottenthaler, 716 F. Supp. 796, 725 F. Supp. 776 (S.D.N.Y. 1989).

The Second Circuit Court of Appeals held that the imposition of an additional housing fee on a wheelchair bound student did not violate section 504. The student requested and received single occupancy of a double room at a university. For the first year he was charged only for a single room but after that he was charged double. After graduation he continued at the university as a graduate student and, at his own request, retained his undergraduate housing unit. The court found that since the student had never applied for accessible housing, such housing was never denied. Also since he had requested the room he had been given, he failed to show a violation of section 504.[118]

Employees

Discrimination Claims. An applicant for a postal service position filed suit after being denied employment due to a history of on-the-job violence and belligerent behavior toward postal officials after he had failed to secure positions in the past. The Sixth Circuit Court of Appeals denied his discrimination claims holding that he was not a handicapped person under section 504 because he failed to show that his asthma substantially limited major life activities and that he failed to produce any evidence that his application was denied solely because of a handicap.[119] A New York federal district court dismissed the claims of a sanitation department employee who had been fired because of positive drug tests indicating heroin use.[120]

The District Court for the District of Columbia held that an alcoholic treasury department employee, who had been dismissed after failing to provide requested medical documentation for frequent absences, failed to support his claim of discrimination since the reason for his dismissal, failure to provide the medical documentation, had nothing to do with his alcoholism. Also, since the department was unaware of the former employee's alcoholism, it was not required to provide him with the protections that must be provided to known alcoholics under the Rehabilitation Act.[121]

A Louisiana federal district court also upheld the dismissal of a licensed practical nurse who had been dismissed after refusing to provide requested medical information. The hospital had requested this information after it became apparent that the nurse had a high

118. Fleming v. New York Univ., 865 F.2d 478 (2d Cir. 1989).

119. Harris v. Adams, 873 F.2d 929 (6th Cir. 1989).

120. Fowler v. New York City Dep't of Sanitation, 704 F. Supp. 1264 (S.D.N.Y. 1989).

121. Fong v. United States Dep't of Treasury, 705 F. Supp. 41 (D.D.C. 1989).

medical risk of having an infectious disease. The court held that the nurse had been fired because he failed to comply with hospital policy and not because he was perceived to be handicapped. The court also held that his failure to comply with the hospital's legitimate request rendered him not otherwise qualified to perform his job.[122]

The Commonwealth Court of Pennsylvania upheld the section 504 claims of bus drivers who had their licenses revoked for medical reasons. The cases involved drivers who had experienced heart attacks or epileptic seizures. The court held that once it had been established that a chronic medical condition existed, the drivers could rely on section 504 as an affirmative defense and that the burden was on the Department of Transportation to prove the drivers could not safely operate their buses.[123]

Handicapped Persons. In order to be considered a handicapped person under the section 504 regulations, a claimant must have an impairment which substantially limits one or more major life activities, have a record of such an impairment, or be regarded as having such an impairment.[124] The Sixth Circuit Court of Appeals held that an applicant for a postal position was not a handicapped person because his asthma did not substantially limit his life activities.[125] The Ninth Circuit Court of Appeals held that a worker who had been dismissed from the Corps of Engineers after an x-ray revealed a spinal deformity, was handicapped because he was so regarded by the Corps.[126]

Otherwise Qualified Individuals. The Supreme Court has held that an otherwise qualified person is an individual who can meet all of the employment requirements in spite of the handicap.[127] An employee of the Department of Agriculture who suffered from a mental disorder that caused anxiety over travel and a propensity to shoplift was dismissed because of convictions of shoplifting and other acts of dishonesty. The federal district court in Maryland held he was not otherwise qualified because he could not perform the prerequisites of his job. The court noted that handicapped discrimination laws protect only those who can perform their jobs in spite of their handicap.[128]

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122. Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 714 F. Supp. 1377 (E.D. La. 1989).
123. Commonwealth v. Brown, 558 A.2d 121 (Pa. Commw. Ct. 1989); Commonwealth v. Chalfant, 565 A.2d 1252 (Pa. Commw. Ct. 1989).
124. 34 C.F.R. § 140.1(j).
125. Harris v. Adams, 873 F.2d 929 (6th Cir. 1989).
126. Thornhill v. Marsh, 866 F.2d 1182 (9th Cir. 1989).
127. Southeastern Community College v. Davis, 442 U.S. 397 (1979).
128. Fields v. Lyng, 705 F. Supp. 1134 (D. Md. 1988).

A New York federal district court held that in order to be considered otherwise qualified a handicapped person was required to demonstrate that he could perform the essential functions of the job. The court further held that an employer was allowed to consider potential safety risks to other employees in making an employment decision.[129] Similarly, the federal district court in the District of Columbia upheld the firing of a federal agency employee who physically assaulted a female supervisor, ruling that the employee was not otherwise qualified because he could not perform his duties without endangering the health and safety of himself or others.[130]

Reasonable Accommodation. Under section 504 regulations employers are required to make reasonable accommodations for handicapped employees unless doing so would impose an undue hardship on the operation of the program.[131] The Fourth Circuit Court of Appeals held that the following procedures must be followed by government agencies in dealing with alcoholic employees: (1) inform the employee of available counseling, (2) provide the employee with a firm choice between treatment and discipline, (3) permit the employee to participate in outpatient treatment, (4) permit the employee to participate in an inpatient program, if necessary, and (5) dismiss the employee.[132]

An Illinois federal district court held that reasonable accommodations could be made for a deaf postal employee who sought a promotional position. The court held that a requirement that the employee be able to hear conversational speech was overbroad and discriminatory because that ability was not a business necessity. Furthermore, a requirement that the employee answer the telephone was not an essential function of the position.[133] A Pennsylvania state court held that monitoring a diabetic's ability to operate a school bus on a daily basis would not place an undue burden on her employer.[134]

However, reasonable accommodation does not require an agency to indulge a propensity for violence even if it is caused by a handicap according to the District of Columbia District Court.[135] Also, an employer is not required to materially change its job description or lower its standards when the handicap relates to reasonable criteria

129. Serrapica v. City of N.Y., 708 F. Supp. 64 (S.D.N.Y. 1989).
130. Adams v. Alderson, 723 F. Supp. 1531 (D.D.C. 1989).
131. 34 C.F.R. § 104.12.
132. Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989).
133. Davis v. Frank, 711 F. Supp. 447 (N.D. Ill. 1989).
134. Commonwealth v. Tinsley, 564 A.2d 286 (Pa. Commw. Ct. 1989).
135. Adams. v. Alderson, 723 F. Supp. 1531 (D.D.C. 1989).

for employability according to a ruling by a New York federal district court.[136]

Other Section 504 Issues

The Fourth Circuit Court of Appeals held that in order for a handicapped child's attorneys to receive a fee award under section 504 they must be able to show that the lawsuit contributed in a significant way to obtaining the relief sought. Since the court found that filing of the lawsuit in question did not contribute to the readmission of a child with AIDS to school that requested fee award was denied.[137] An Illinois state court also denied an award of attorneys fees because the students had been unable to establish that they were denied a free education solely on the basis of their handicap. The students, who had been placed in a private residential center for the treatment of drug and alcohol abuse, had been charged tuition to attend the local public schools because of their nonresident status.[138]

The Eleventh Circuit Court of Appeals held that appellants, administrators of county special education programs and the Georgia Department of Education, were required to exhaust administrative appeals prior to bringing a suit in the federal courts. The Office of Civil Rights (OCR) had initiated investigations of the special education programs in response to parental complaints. When the administrators of the programs refused to cooperate in the investigations OCR started proceedings to terminate federal funds. The state and counties filed suit claiming that OCR was acting beyond its jurisdiction in investigating complaints about the special education programs. The district court dismissed for failure to exhaust administrative appeals. The appeals court affirmed the decision holding that the appellants had failed to demonstrate that they would be irreparably injured by the requirement to exhaust, that the appellants had not shown that OCR was plainly without jurisdiction, and that the agency's expertise in this matter would greatly aid a reviewing court.[139]

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136. Serrapica v. City of N.Y., 708 F. Supp. 64 (S.D.N.Y. 1989).
137. Child v. Spillane, 866 F.2d 691 (4th Cir. 1989).
138. Doe v. Sanders, 545 N.E.2d 454 (Ill. App. Ct. 1989).
139. Rogers v. Bennett, 873 F.2d 1387 (11th Cir. 1989).